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In The

Supreme Court of The United States

October Term, 1978

No. 79-386

JACK H. HARRISON, as Temporary Trustee of the
Linn-Henley Charitable Trust,
Petitioner,

v.

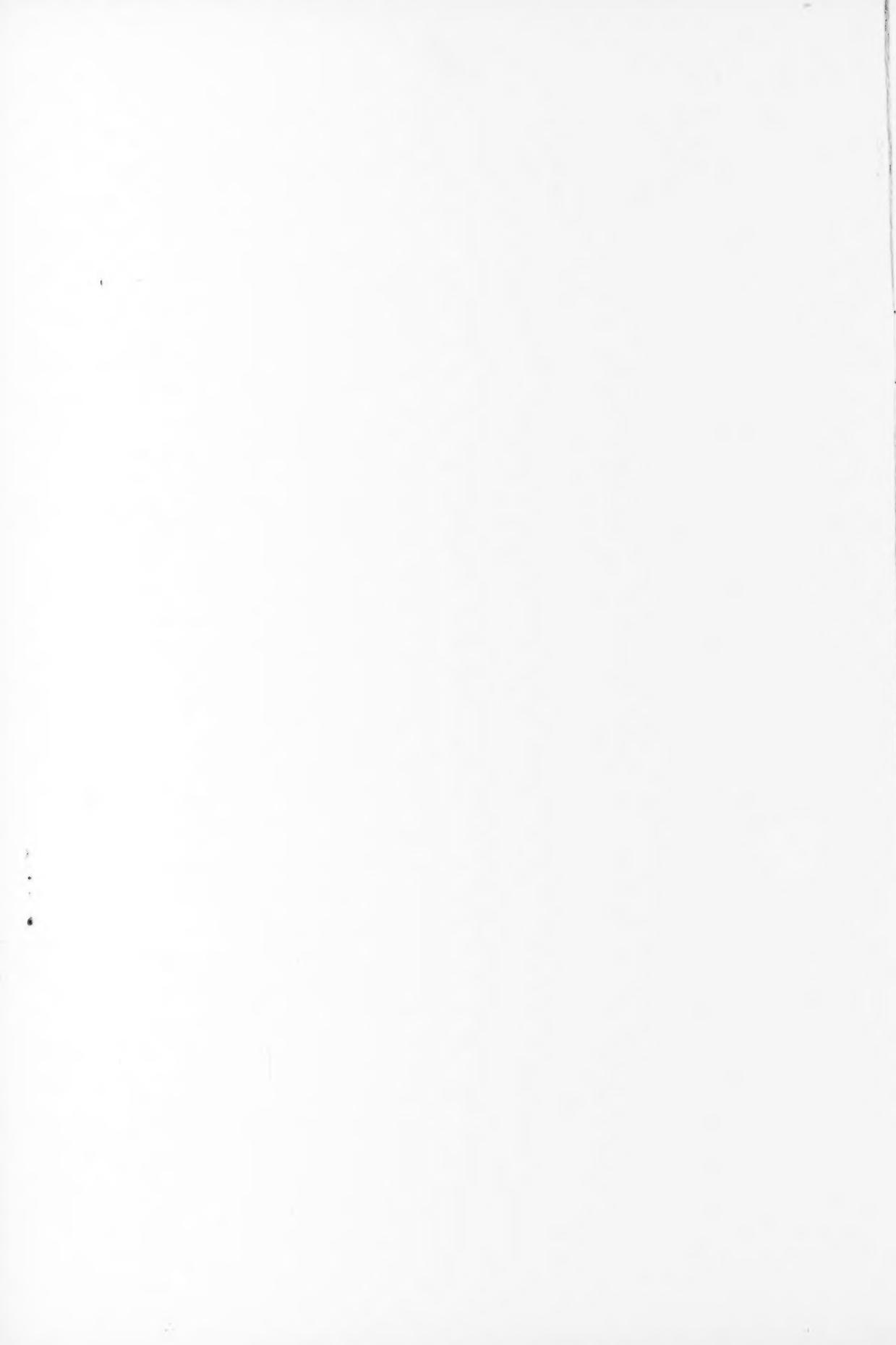
BIRMINGHAM TRUST NATIONAL BANK, a National Banking Institution, as Co-trustee of the Linn-Henley Charitable Trust, SOUTHERN BANCORPORATION OF ALABAMA, a Delaware Corporation, JOHN C. HENLEY, III, as Co-trustee of the Linn-Henley Charitable Trust, and CHARLES A. GRADDICK, Attorney General of the State of Alabama, Respondents.

Brief in Opposition to Petition for Writ of Certiorari

MACBETH WAGNON, JR.
1500 Brown-Marx Building
Birmingham, Alabama 35203

Counsel for Respondents
Birmingham Trust National Bank and
Southern Bancorporation of Alabama

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The petition of the Temporary Trustee (hereafter the "Petition") asserts one of the same basic principles that is urged in the recently filed petition of *Birmingham Trust National Bank v. Harrison, et al* (No. 79-374), namely, that federal law controls under the supremacy provision of the federal Constitution. Nevertheless, the Petition is fundamentally defective because it does not anywhere adequately show that the Temporary Trustee now relies

upon any federal question that was raised, and thereafter consistently maintained, in the proceedings below.

The Temporary Trustee attacks that part of the judgment below (designated "II") which reversed the trial court's award of \$1,209,240 in damages because BTNB declined to join with its co-trustee (Respondent John C. Henley, III) in buying for the Trust 27,460 shares of stock of the Holding Company at the auction held on February 10, 1970. However, this reversal by the Alabama Supreme Court was not based on any federal grounds. Rather, it was based upon the common law principles that, in the absence of express authority in the governing instrument, a trustee cannot properly purchase property from itself for a trust it is administering and a corporate trustee cannot properly invest trust funds in its own stock or in the stock of one of its affiliates (citing *II Scott on Trusts* §170.13 3d ed. 1967 and *54 Am. Jur. Trusts* §413) and on other state-law grounds. (See Appendix, p. A17-A21.) The only reference to any federal law in this part of the Alabama Supreme Court's opinion is to the fact that the Comptroller of the Currency ("Comptroller") had adopted a regulation of similar import, binding national banks. (Appendix, p. A20.) Although the Comptroller's regulation tends to buttress the state-law grounds for the decision below, it is entirely clear that the state-law grounds are independent and self-sufficient.

Whatever federal grounds may have been raised by the Temporary Trustee in his pleadings in the trial court, it is clear that the trial court based its decision entirely on state-law grounds, namely, that the respondent Birmingham Trust National Bank ("BTNB") had, in various ways, breached its fiduciary duty to the Trust. (See Appendix, at pp. A10-A12.) The Temporary Trustee took

no appeal from the trial court's failure to grant relief on the various federal grounds he had raised. Nor did he argue them to the Alabama Supreme Court as alternate grounds for affirming the judgment of the trial court. To the contrary, all of his contentions in support of the judgment of the trial court were based on claimed breaches of the trustee's fiduciary duty. Thus, the Temporary Trustee *abandoned* any federal grounds he may have raised in the trial court and those grounds are not now available as a basis for jurisdiction in this Court.

The Temporary Trustee frames "questions presented" which challenge the validity of BTNB's 1968 Merger and Reorganization on numerous grounds, stated to be federal grounds. These include allegations that the "triangular" form of merger was violative of 12 USC 215a (a position with which BTNB disagrees), that 12 USC 215a did not authorize the sale of stock of the Holding Company at the auction required in the event of dissent, that BTNB's Proxy Statement was inadequate and misleading, that the auction was improperly held because it involved the sale of unregistered Holding Company stock and was inadequately advertised and, finally, that there were violations, not fully specified, of various security laws and regulations promulgated thereunder. However, none of these claims form the basis of decision in either of the courts below. They were *not rejected* by the courts below—they were simply never presented to either court in any way that required decision.

In spite of specific references to 12 USC 215a, to the Securities Act of 1933, the Securities Exchange Act, and to various alleged deficiencies in the advertising and holding of the auction, it is the claims of so-called self-dealing by BTNB and forbidden competition with the

Trust at the auction that form the whole basis of the Temporary Trustee's Petition.

Most, if not all of the contentions comprised in the "questions presented" are foreclosed by the failure of the Temporary Trustee to challenge one part of the decision on the first appeal. In its 1975 opinion, the Alabama Supreme Court stated, in substance, that it was not passing on the propriety of BTNB's decision to merge itself from a national bank into a holding company, because that decision was solely within the discretion of the directors and stockholders of BTNB. The Alabama Court noted that the option of dissent was available to those who were in disagreement with the decision and that Mr. Henley's attempt to challenge the validity of BTNB's Merger was, for those reasons, without merit. (See Appendix in No. 79-374, at p. 72.) The Temporary Trustee never thereafter challenged that holding of the Alabama Supreme Court, either in the second trial or on the second appeal.

To the contrary, the Temporary Trustee continued to assert that the Trust should have all the benefits of a dissenter from the Merger, including the right to receive the value of its stock in "Old" BTNB under the procedure prescribed by 12 USC 215a. Indeed, the damages that the Temporary Trustee now seeks to reinstate were based on the bid made by BTNB's Holding Company for its own stock at the auction that was conducted pursuant to 12 USC 215a, solely because of the Trust's dissent, a procedure which the Temporary Trustee also attacks. It is well established that a litigant cannot be allowed to prevail by claiming under and against the same transaction. *31 C.J.S. Estoppel*, §109, pp. 559-61; *Gibson v. Lyons*, 115 U.S. 439, 29 L.Ed. 440, 443 (1885).

Thus, contrary to the contention made at pages 34-36

of the Petition, the decision of the Supreme Court of Alabama was based upon independent state grounds and the Petition should be denied because there is no basis for jurisdiction in this Court.

Macbeth Wagnon, Jr.
1500 Brown-Marx Building
Birmingham, Alabama 35203
(205) 252-4500

Counsel for Respondents
Birmingham Trust National Bank
Southern Bancorporation of
Alabama